

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   MARGARET MINNECI, ET AL.,                   :

4                   Petitioners                   :

5                   v.                               :   No. 10-1104

6   RICHARD LEE POLLARD, ET AL.               :

7   - - - - - x

8                               Washington, D.C.

9                               Tuesday, November 1, 2011

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11                   The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 11:03 a.m.

14 APPEARANCES:

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16 behalf of Petitioners.

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18 General, Department of Justice, Washington, D.C.; for  
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20 Petitioners.

21 JOHN F. PREIS, ESQ., Richmond, Virginia; on behalf of  
22 Respondents.

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 10-1104, Minneci v. Pollard.

5 Mr. Franklin.

6 ORAL ARGUMENT OF JONATHAN S. FRANKLIN

7 ON BEHALF OF THE PETITIONERS

8 MR. FRANKLIN: Mr. Chief Justice, and may it  
9 please the Court:

10 Over the last 3 decades, the Court has made  
11 clear that Bivens remedies are disfavored and will only  
12 be authorized in narrow situations where there are no  
13 adequate alternative means for redressing a plaintiff's  
14 injuries and no other factor counsels hesitation.  
15 Respondent has satisfied neither criteria. He has not  
16 shown that he lacked a traditional tort remedy for the  
17 injuries of which he complains, and Petitioners' status  
18 as employees of a private contractor rather than the  
19 government at a minimum gives rise to factors counseling  
20 hesitation.

21 JUSTICE GINSBURG: Can we go back to what  
22 you said initially, that is if there's no alternative  
23 remedy Bivens fills the gap.

24 Suppose we had a case just like Carlson,  
25 only the State law allows survivor actions. In Carlson,

1 I thought the rule emerging from Carlson is that prison  
2 personnel in Federal prisons are subject to Bivens  
3 liability, and we don't look in each case to see whether  
4 they could have been a State tort.

5 MR. FRANKLIN: Well, the rule --

6 JUSTICE GINSBURG: Is that so?

7 MR. FRANKLIN: The the rule -- the Carlson  
8 rule still applies, Your Honor, because that involved  
9 actual Federal government employees. And since Carlson,  
10 Congress has preempted all tort claims against them. So  
11 whether Indiana law now, which has been amended, but  
12 whether Indiana law provides a remedy or doesn't is  
13 immaterial, because Congress has preempted all tort  
14 claims against actual employees of the government.

15 But these -- this case involves -- the  
16 Petitioners are not employees of the government. They  
17 are employees of a private contractor. And under the  
18 Westfall Act, what Congress did was preempt all claims  
19 against actual government officials while preserving  
20 Bivens remedies.

21 But it did the opposite for employees of  
22 private contractors. For them there are adequate  
23 alternative tort remedies. And it's virtually  
24 undisputed in this case that there was such a remedy  
25 here. And they are deliberately -- Congress expressly

1 excluded them from the category of employees against  
2 whom it preserved Bivens remedies.

3 So yes, in the Carlson situation, there is  
4 still a Bivens claim because Congress has expressly  
5 preserved that. But here we have a different  
6 congressional policy that we are, in effect, asking the  
7 Court to embrace here.

8 What Congress did in the Westfall Act is it  
9 said what in effect we are asking this Court to  
10 recognize and what we believe the Court has recognized  
11 in cases like Malesko, and that is, where there are  
12 adequate alternative tort -- excuse me, where there are  
13 no adequate --

14 JUSTICE KAGAN: Suppose, Mr. Franklin, that  
15 there weren't. I mean, I think you have a good case  
16 about California law here. But suppose we were in a  
17 State where the law was very different from what  
18 California's law appears to be, where there was no  
19 special duty recognized for jailors, and indeed where  
20 the basic negligence tort was unavailable to inmates  
21 because there was a finding of -- a holding of the State  
22 supreme court that there was no duty on the part of  
23 jailors to inmates. What would happen then?

24 MR. FRANKLIN: In that hypothetical instance  
25 -- and we do think it's hypothetical -- we think that

1 would be a different case and the Court could in that  
2 circumstance say there were no adequate alternative  
3 remedies. But the reason we think it's entirely  
4 hypothetical is there has nothing been shown in the  
5 briefing of this Court and, as the Ninth Circuit  
6 dissenters made clear, that any State doesn't afford the  
7 bedrock cause of negligence. And that cause, as the  
8 Court held in *Malesko* quite expressly, is not only  
9 adequate to redress any actions that would violate the  
10 Eighth Amendment, but it's actually superior.

11 JUSTICE KAGAN: But is your answer --

12 JUSTICE GINSBURG: Mr. Franklin, there were  
13 some references to Mississippi law that seems to be  
14 inconsistent with the notion that all States would  
15 provide an adequate remedy.

16 MR. FRANKLIN: I believe that reference, if  
17 I am correct, comes from an amicus brief, and that law  
18 does not -- would not on its face prohibit an action  
19 against a private managed prison holding Federal  
20 prisoners. These laws -- and the Mississippi law is an  
21 example; there is a New York law -- those apply to State  
22 government officials. They are similar to the Westfall  
23 Act, but on a state level. They immunize State  
24 government officials from claims, but those claims would  
25 be subject to 1983 actions. Here we have a privately

1 managed prison holding Federal prisoners.

2 JUSTICE GINSBURG: Is it-- then it might  
3 hold State prisoners as well.

4 MR. FRANKLIN: I'm sorry?

5 JUSTICE GINSBURG: It might hold -- some  
6 private facilities will take State prisoners as well as  
7 Federal prisoners.

8 MR. FRANKLIN: There has been some  
9 representation, that we don't disagree with, that there  
10 might be some facilities that have State prisoners  
11 and --

12 JUSTICE GINSBURG: And if they do have State  
13 prisoners, the State prisoner would have recourse to,  
14 not Bivens, but 1983.

15 MR. FRANKLIN: Most likely, Your Honor, yes,  
16 if it's under --

17 JUSTICE GINSBURG: So you have two  
18 prisoners, identical mistreatment, and one gets a  
19 Federal remedy and the other doesn't.

20 MR. FRANKLIN: The other actually gets what  
21 the Court in Malesko described as a superior remedy.  
22 The prisoner -- the Federal prisoner has, in that sense,  
23 a remedy that's beyond the Eighth Amendment, that goes  
24 --

25 JUSTICE KENNEDY: Can you tell me why it is

1     that you, you care in this suit? If you are telling us,  
2     oh, don't worry, there's going to be liability and  
3     probably perhaps even more extensive liability than  
4     Bivens, what difference does it make? Bivens doesn't  
5     give you attorneys fees. Now, it's true that the  
6     Federal question may get you into Federal court.

7                   MR. FRANKLIN: Well, I have several answers  
8     to that. First, Your Honor, my clients care very deeply  
9     in this case because, as the district court held, if  
10    there is no Bivens remedy this case is dismissed. This  
11    case was dismissed on the lack of a Bivens remedy.

12                   JUSTICE KENNEDY: Just because of the  
13    statute of limitations?

14                   MR. FRANKLIN: It's way too late now, 10  
15    years after the incident, for them to now assert a State  
16    law claim. So we do care. And in fact that was the  
17    same situation that was in Malesko. In Malesko you had  
18    a virtually identical situation, where the --

19                   JUSTICE KENNEDY: If we are looking -- if we  
20    are looking forward beyond this case --

21                   MR. FRANKLIN: Right.

22                   JUSTICE KENNEDY: -- and there is no statute  
23    of limitation problem, does it really make any  
24    difference that he has a second cause of action that's  
25    just, A --



1 MR. FRANKLIN: It makes a --

2 JUSTICE KENNEDY: -- duplicative or, B,  
3 arguably narrow, more narrow?

4 MR. FRANKLIN: Well, two points. I'd like  
5 to first say that the Court in Malesko adopted the  
6 principle that if there is an alternative remedy that's  
7 not a reason for piling on a Federal remedy; that's a  
8 reason not to. But in a practical sense --

9 JUSTICE KENNEDY: But what difference does  
10 it make?

11 MR. FRANKLIN: Let me give you a practical  
12 difference that it does matter for individuals in my  
13 clients' situation. If a State tort claim is brought,  
14 there is respondeat superior liability under a State  
15 court claim. And in many, if not most cases, the  
16 plaintiff will choose, voluntarily choose to sue the  
17 corporation and leave the individual out of the case.

18 Now, the deterrent effect that Bivens is  
19 concerned with still exists because the case can be  
20 brought against the individual. However, if there is a  
21 Bivens claim, that has to be brought against the  
22 individual; it cannot be brought under respondeat  
23 superior. So if there is a Bivens claim, as a practical  
24 matter you are going to see more and more individuals  
25 being dragged through these cases without, by the way,

1 the recognized qualified immunity defense --

2 JUSTICE KAGAN: Mr. Franklin, do you have a  
3 theory about why these are brought as Bivens claims? It  
4 seems mysterious to me. If you bring it as a negligence  
5 claim, you get a lower standard of liability, negligence  
6 versus deliberate indifference. You get vicarious  
7 liability. So I have been trying to puzzle out, why  
8 aren't these brought as negligence claims rather than as  
9 Bivens claims?

10 MR. FRANKLIN: I can't answer that question.  
11 What I can say -- well, I can try to answer, but I can  
12 say that if the Court rules as we ask it to in this  
13 case, we think that there will not be Bivens claims,  
14 that people will bring them under the tort law.

15 It could be there are forms in some of these  
16 prisons that are given out that have section 1983  
17 written on them, that Bivens is there. It could be that  
18 prisoners are not quite aware that the Westfall Act  
19 doesn't cover private contractors.

20 But we would think if the Court rules as we  
21 suggest it should, that the -- that the prisoners who  
22 are relatively savvy, even on a pro se basis, about  
23 their rights would then understand that they have these  
24 rights and will exercise them and that the Bivens remedy  
25 would not have been to be employed willy-nilly as it was

1 in this case.

2 JUSTICE KAGAN: To go back to what I asked  
3 before when I hypothesized a State that didn't have  
4 adequate remedies, and you said -- well, just to pin  
5 down what you said, if there were no adequate remedies  
6 there would be a Bivens action available?

7 MR. FRANKLIN: There might be, Your Honor.  
8 There still is the factors counseling hesitation, which  
9 is the second step of the Bivens analysis. And I  
10 wouldn't want to give up that there might be factors in  
11 those cases counseling hesitation. But certainly our  
12 position is not that -- in a circumstance, if that  
13 arose, and again we think that's hypothetical because  
14 there is no indication either that it has arisen or that  
15 it will arise, but if it were to, our position wouldn't  
16 rule out the possibility of a Bivens claim in those  
17 circumstances.

18 JUSTICE ALITO: To get back to the question  
19 that Justice Ginsburg asked, is that consistent with  
20 Carlson? Because the Court in Carlson didn't say that  
21 there is a Bivens action because in this particular  
22 State there isn't a viable State action, but it might be  
23 different in another State where there is a viable State  
24 claim. It did it on basically a categorical ground.

25 MR. FRANKLIN: Well, as the case came to the

1 Court in Carlson, it was undisputed that there was no  
2 adequate State law remedy, the lower courts had held.  
3 So that was sort of the basic premise that the Court  
4 then went ahead and decided the case on.

5 Since Carlson, we've had cases, notably  
6 Malesko and also Wilkie, which have made clear that the  
7 adequacy of remedies, including State law remedies, is a  
8 factor in the Bivens analysis and is in fact the  
9 dispositive factor in Malesko, as in this case as well.

10 We don't think that there is really any  
11 serious dispute in this case that there were adequate  
12 alternative remedies. Again, the deliberate  
13 indifference standard is much, much more hard -- much  
14 harder to meet than a traditional negligence standard.  
15 California law is, further, more protective of  
16 prisoners.

17 As we understand the Respondents' position,  
18 the Court -- they would urge the Court, notwithstanding  
19 the availability of alternative remedies in this case  
20 and as far as we can tell in every foreseeable case, to  
21 create what they refer to as a categorical cause of  
22 action, one that would apply regardless of whether the  
23 remedies are adequate or not.

24 And in our view, that would turn the Bivens  
25 jurisprudence effectively on its head. The Court has

1    said Bivens is a narrow -- I think Justice Ginsburg at  
2    least paraphrased our argument as saying it's a  
3    gap-filling mechanism, which is what our argument is --  
4    that would apply only in those circumstances when it's  
5    necessary. Other than that, the Court has consistently  
6    deferred the matter to Congress. And that's where we  
7    think it ought to lie in this case.

8                   JUSTICE ALITO: Does a prisoner in a State  
9    that requires the filing of a certificate of merit in a  
10   medical malpractice case have an alternative -- a viable  
11   alternative State claim --

12                   MR. FRANKLIN: Yes, again, that's --

13                   JUSTICE ALITO: -- for malpractice?

14                   MR. FRANKLIN: We say yes. That issue is  
15   not in this case. The Eleventh Circuit in Alba  
16   expressly addressed that issue under that State's law,  
17   and said yes, that is adequate. It's simply a  
18   procedural requirement that applies to all plaintiffs.

19                   And I would add, by the way, that --

20                   JUSTICE KAGAN: How is a prisoner supposed  
21   to satisfy that requirement?

22                   MR. FRANKLIN: The same way any other  
23   plaintiff is supposed to. What I was going to add is  
24   that when you are alleging an Eighth Amendment  
25   violation, you are talking about a claim that by its

1 nature is very severe. You are talking about deliberate  
2 indifference to serious medical needs that constitutes  
3 the unnecessary and wanton infliction of pain.

4 In those circumstances, we would suggest  
5 that it might even be easier to procure that kind of  
6 declaration, but -- that issue was decided in Alba, so  
7 that -- that was decided. If it comes up in another  
8 case, it can be decided there. We don't think that that  
9 would render the -- if it's -- if it's an adequate  
10 remedy for everyone else in that State and most States  
11 that have these things, then it's an adequate remedy for  
12 Bivens.

13 JUSTICE GINSBURG: Did any of those courts  
14 address the problem of how the pro se prisoner is going  
15 to get an affidavit?

16 MR. FRANKLIN: Well, Alba -- the Alba court  
17 is -- is the only court that I'm aware of on the circuit  
18 level that's considered it. And I believe they did  
19 address that issue and simply said that it is -- puts  
20 them on an equal footing with other plaintiffs, and that  
21 that would be an adequate remedy.

22 CHIEF JUSTICE ROBERTS: I don't -- I don't  
23 understand your answer to Justice Kagan. If -- if I  
24 heard you right, you were saying, well, they are going  
25 to be able to get a certificate because it's an Eighth

1 Amendment violation and everything is very severe. But  
2 the point is, they are going to bring a negligence  
3 action, not an Eighth Amendment action.

4 MR. FRANKLIN: Right.

5 CHIEF JUSTICE ROBERTS: So --

6 MR. FRANKLIN: I'm talking about if the  
7 conduct -- we are comparing here between conduct that  
8 would violate the Eighth Amendment and conduct that is  
9 negligent, and I'm saying if the conduct rises to the  
10 level of an Eighth Amendment violation, which is what  
11 we're talking about in terms of the adequacy, then it  
12 would be easier, one would presume.

13 JUSTICE KAGAN: But I think the question,  
14 Mr. Franklin, is really just a practical one --

15 MR. FRANKLIN: Sure.

16 JUSTICE KAGAN: -- which is how a pro se  
17 person sitting in prison is supposed to have access to a  
18 doctor who will provide this certificate. And, I mean,  
19 maybe there would be means, but I'm asking whether there  
20 would be.

21 MR. FRANKLIN: I would think there would,  
22 but I don't want to say -- I don't want to argue someone  
23 else's case on that. I mean, I do think that that was  
24 an issue that was resolved, at least in the Eleventh  
25 Circuit in *Alba*. It's not an issue that applies in this

1 case because there is no such certificate here in  
2 California.

3 I do think it would be adequate. I mean,  
4 Bush v. Lucas, which was a Federal remedies case, said  
5 there were what they called "meaningful remedies." As  
6 long as there is a meaningful remedy, it's sufficient.  
7 And if Congress wants to think that there is a problem,  
8 for example, if Congress thinks there is a problem with  
9 these certificates of merit in the case of privately run  
10 facilities, then it certainly can establish a cause of  
11 action as it did in section 1983.

12 But the Bivens doctrine is really a narrow,  
13 as we say, gap-filling doctrine. And the Court has  
14 always used it very sparingly. And the reason the Court  
15 has done that is because there is no authority for it in  
16 the language of any constitutional or statutory  
17 provision.

18 So the Court has always treaded very  
19 cautiously in this area. And I wouldn't rule out in  
20 that circumstance that somebody could make that  
21 argument. I -- I just don't think in this case there  
22 has been any real dispute that there's an adequate  
23 remedy. There wasn't in Malesko and that was sufficient  
24 in that case. And we think it is sufficient in this  
25 case as well for the Court to in effect stay its Bivens



1 hand and turn the matter if necessary over to Congress.

2 JUSTICE ALITO: Under the PLRA -- under the  
3 PLRA, a district judge has to perform a screening  
4 function for -- for these complaints, and is that -- is  
5 it going to be an impossible burden for district judges  
6 to ascertain the contours of state prison law, in that  
7 there apparently is not a lot of prisoner litigation  
8 under State law? Most prisoners seem to choose 1983.

9 MR. FRANKLIN: Well, in this case, the  
10 magistrate judge did it. It wasn't an impossible burden  
11 for him. This was done on a prescreening; the Court  
12 ruled exactly as we are asking the Court to rule now.  
13 The Court did -- the Court in Malesko did it. It wasn't  
14 difficult. If it is deemed that there is an issue  
15 there, there are various procedural mechanisms that  
16 could be employed. There could be a dismissal without  
17 prejudice, a dismissal with repleading, certificate to a  
18 State court. You could stay the Bivens action.

19 There's various things that district courts  
20 can do. But in this case, it wasn't an issue. It  
21 wasn't an issue in Malesko. We don't think it's going  
22 to be an issue in others either.

23 If I may reserve the remainder of my time.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Shah.

1 ORAL ARGUMENT OF PRATIK A. SHAH  
2 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
3 SUPPORTING THE PETITIONERS

4 MR. SHAH: Mr. Chief Justice, and may it  
5 please the Court:

6 The last 3 decades of this Court's  
7 precedents make clear that judicial extension of the  
8 Bivens remedy is not the default presumption. It is  
9 permissible only where there is no adequate alternative  
10 remedy and there are no other factors counseling  
11 hesitation. Neither criterion is satisfied here.

12 Respondent is suing employees of a private  
13 prison corporation who, unlike their Federally employed  
14 counterparts, are subject to well-established theories  
15 of tort liability, but lack a recognized qualified  
16 immunity defense. Under the circumstances present here,  
17 which I submit reflect the heartland of cases alleging  
18 Eighth Amendment violations for deliberate indifference  
19 to serious medical needs, recognition of the Bivens  
20 remedy is neither necessary nor appropriate.

21 JUSTICE GINSBURG: Mr. Shah, go back to what  
22 you said about lacking these private -- these employees  
23 of the private corporation you said lack qualified  
24 immunity. But they do have -- courts have allowed them  
25 to have a good faith defense. So in practice, how

1 different is that, whether they have qualified immunity  
2 or whether they have a good faith defense?

3 MR. SHAH: A couple of responses, Your  
4 Honor.

5 First, this Court has never recognized a  
6 good faith defense, so I wouldn't call it a recognized  
7 defense. It is true that some lower courts have applied  
8 a good faith defense. Reading those cases, it is not  
9 entirely clear exactly what the content of that good  
10 faith defense is. What is clear is that it is something  
11 less than qualified immunity. It appears in most of the  
12 cases that they are grafting on some sort of subjective  
13 element, subjective intent element, on top of what you  
14 must establish to get qualified immunity.

15 So whatever it is, it is something lesser  
16 than qualified immunity, and I think that in and of  
17 itself creates an asymmetry. But I think the larger  
18 point is, is that these prisoners have alternative  
19 adequate remedies under State law because they are suing  
20 a private employee rather than a government employee.

21 The government employee is subject to the  
22 Westfall Act and therefore all civil actions other than  
23 Bivens are preempted. So I think that's the fundamental  
24 difference. I think it further counsels hesitation  
25 because of the lack of a recognized immunity defense,

1 whether that's qualified immunity or good faith.

2 JUSTICE SOTOMAYOR: Could you address the  
3 question posed earlier of what were to happen if there  
4 was a State law that gave absolute immunity to these  
5 private correctional officers and that was the case  
6 before us. This particular State, it's undisputed,  
7 would not permit any kind of intentional or negligence  
8 suit against these officers.

9 MR. SHAH: Sure. Your Honor, in that  
10 hypothetical -- and of course, there is no suggestion in  
11 this case that any State has such a rule -- but if a  
12 State were to adopt that such rule, I think that would  
13 be a case where there is no adequate alternative remedy,  
14 because in your -- in your hypothetical, there is  
15 absolute immunity. There wouldn't be a way for the  
16 prisoner to redress -- seek redress for the gravamen of  
17 his injuries. And I think in that case, we have a very  
18 different situation and a Bivens remedy may well be  
19 justified.

20 JUSTICE SOTOMAYOR: Interesting, because  
21 what you are proposing is a sort of State by State,  
22 circuit by circuit, presumably existence of a Bivens  
23 claim or not. That -- that is really the outcome of  
24 your position.

25 MR. SHAH: Well, yes, Your Honor, except the

1 fact that there has been no suggestion that any State  
2 has such a draconian rule or has ever passed one. We  
3 are simply arguing for a rule that would limit Bivens  
4 when there is no adequate State law remedy. That is  
5 clearly the case here. It's clearly going to be the  
6 case in the vast majority of Eighth Amendment prisoners.  
7 What this Court should not do is craft a default rule  
8 allowing Bivens remedies against employees of private  
9 prison corporations just to account for the hypothetical  
10 possibility that there may be a case which may or may  
11 not ever arise in which an adequate alternative is not.  
12 That turns Bivens jurisprudence on its head.

13 JUSTICE SOTOMAYOR: Then I guess the  
14 question is, yes, when you talk about an overlap of  
15 remedies, we have said that it doesn't need to be a  
16 matching one to one remedy, but you do need some degree  
17 of meaningful overlap, don't you?

18 MR. SHAH: I would agree with that, Your  
19 Honor. I think --

20 JUSTICE SOTOMAYOR: So how -- define how  
21 much or how do we describe the adequacy of that order?

22 MR. SHAH: I think it would be difficult to  
23 come up with a precise formulation. I think the  
24 formulation that we use in our brief is that as long as  
25 it redressed the gravamen of the prisoner's injuries.

1     So I think as long as it provides some meaningful relief  
2     for the injuries and in turn that would provide some  
3     deterrence to the individual employees' actions, I think  
4     as long as those two elements are present, I think we  
5     would think that there is an adequate alternative  
6     remedy.

7                     Or, alternatively, if you wanted to use the  
8     words -- the word that this Court used in Bivens, you  
9     could approach it from the flip side and say there would  
10    not be an adequate alternative remedy where the State  
11    law is either inconsistent with or hostile to the  
12    corresponding constitutional interest. We submit in  
13    this case there is no question that there are remedies  
14    available under California State law and as far as we  
15    know the State law of every other State in this country  
16    that would allow --

17                    CHIEF JUSTICE ROBERTS: The Bivens action is  
18    unusual in the first place, but it's also unusual to say  
19    that you don't have a Federal cause of action because of  
20    something a State gives you.

21                    Do you have any other example of something  
22    like that, where the availability of Federal relief  
23    turns on the availability of alternative relief under  
24    State law?

25                    MR. SHAH: Your Honor, it may not be an

1 exact analog, but I think Federal due process cases  
2 often will look at someone's claims of deprivation of  
3 property, an unlawful deprivation of property in  
4 violation of process. The Federal court may often look  
5 at whether the available State law procedures to provide  
6 redress for that claim before it would impose or find a  
7 violation of Federal due process.

8           So I think there are analogs where Federal  
9 courts do look at the availability of State law remedies  
10 and look at their adequacy before determining whether a  
11 Federal law remedy is necessary. And this Court has  
12 done that. And the Court did it in *Malesko*, I think is  
13 the best example in the *Bivens* context of where the  
14 Court looked at alternative State remedies and said  
15 that, hey look, the availability of these other remedies  
16 counsel against the imposition of the *Bivens* remedy.

17           JUSTICE KAGAN: What is the theory behind  
18 that, Mr. Shah? I mean there is an obvious theory when  
19 Congress has provided an alternative remedial system,  
20 which is a separation of powers theory. But what's the  
21 theory about looking to State law for these kinds of  
22 alternative remedies?

23           MR. SHAH: Two responses, Your Honor. While  
24 I agree the separation of powers problem is much more  
25 heightened when Congress acts, I think there is still a

1 separation of powers issue even when Congress has not  
2 acted. That is, the Court should be hesitant before --  
3 before implying a judicial cause of action for damages  
4 under the Constitution, given that it's typically been  
5 Congress's province to do so.

6 But beyond that, the rationales -- there  
7 have been two rationales that have been given by this  
8 Court in its Bivens jurisprudence for implying such a  
9 remedy. One is the need to provide some meaningful  
10 relief.

11 We submit when there is an alternative state  
12 remedy, that rationale has been satisfied. The other  
13 rationale this Court has offered is provide some  
14 deterrent to the actions of an individual employee or  
15 officer. We also submit that when there is a State tort  
16 damages remedy available, that rationale too will be  
17 accomplished.

18 The three occasions in which this Court has  
19 recognized the Bivens remedy, Bivens itself, Davis and  
20 Carlson, those two factors were not present. There was  
21 either no alternative remedy at all or at least, as in  
22 Carlson, no alternative remedy against the individual  
23 officer.

24

25 JUSTICE ALITO: What would you propose that



1 the Court say about the degree of adequate State remedy  
2 that is necessary? Just -- what we have here in  
3 California is enough and not go any further or --

4 MR. SHAH: I think the Court should start  
5 with that. Certainly here there hasn't been any dispute  
6 that there would be -- any real serious dispute that  
7 there would be an adequate alternative remedy. I think  
8 the Court could also say that as long as the adequate  
9 alternative remedy addresses the gravamen of the  
10 prisoner's injuries, that should be sufficient. And I  
11 think it could give content to that by looking at the  
12 two rationales this Court has offered for Bivens.

13 JUSTICE ALITO: Suppose that a State did for  
14 claims against private prisons and private prison guards  
15 what I understand New York has done with respect to  
16 State-run prisons. In other words, that you eliminate  
17 any claim against individual prison employees or guards  
18 and give the prisoner just a tort claim against the  
19 State. Would that be adequate?

20 MR. SHAH: I think that would be a tougher  
21 case. And, of course, I assume in your hypothetical  
22 that that's -- that that would also apply to Federal  
23 prisoners and Federally contracted prisons, and it's  
24 difficult to figure out what the State's interests --

25 JUSTICE ALITO: Not a claim against the

1 State. I misspoke. A claim -- only a claim against the  
2 company that runs the prison.

3 MR. SHAH: Your Honor, again I think that  
4 would be a more difficult hypothetical because the  
5 rational about individual deterrence of the individual  
6 officer may not be as strong in that hypothetical. But  
7 once again, no State has such a rule and it's difficult  
8 to imagine a State's incentive to adopt such a rule  
9 because it's not coming out of the State's pockets.  
10 These are Federally contracted prisons, contracted by  
11 BOP and run by private prison corporations.

12 JUSTICE GINSBURG: What about the character  
13 of the claim? If it's a Bivens claim it's a  
14 constitutional claim, it's an Eighth Amendment claim.  
15 And if you are looking to state remedies, that's an  
16 ordinary tort remedy with no constitutional involvement.

17 MR. SHAH: Your Honor, it is true, the  
18 labels are different and there's going to be different  
19 meaning to those remedies. But from the prisoner's  
20 standpoint, the rationale behind Bivens was to provide  
21 some damages relief. From the prisoner's standpoint  
22 it's not going to matter, I would submit, whether or not  
23 those damages are procured under State law or under a  
24 constitutionally implied action.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Mr. Preis.

3 ORAL ARGUMENT OF JOHN F. PREIS  
4 ON BEHALF OF THE RESPONDENTS

5 MR. PREIS: Mr. Chief Justice and may it  
6 please the Court:

7 The question before the Court today is  
8 whether a Federal prisoner's access to constitutional  
9 remedies should turn on the mere happenstance of where  
10 the prisoner is detained. The Petitioner's chief  
11 argument is that privately-held Federal prisoners should  
12 not have an Eighth Amendment damages remedy because they  
13 have damages under State law. This argument suffers  
14 from two flaws. First, it misconceives this Court's  
15 Bivens jurisprudence; second, it misconceives the nature  
16 of State remedies available to prisoners.

17 JUSTICE SOTOMAYOR: Why are State  
18 remedies -- what of your clients' claims could not be  
19 vindicated under State law? And why is a Bivens action  
20 superior to a negligence action in California?

21 MR. PREIS: Your Honor, with regard to the  
22 claims that can't be vindicated under State law, we  
23 think its likely that his medical malpractice claims,  
24 the claims against the doctors, could be vindicated. We  
25 don't think the law is clear in -- excuse me -- in

1 California that his other claims, the deprivation,  
2 nutrition, hygiene, forced labor at some point before  
3 his injuries were healed, that those would necessarily  
4 be covered.

5 We admit there is a chance, as we did in our  
6 brief, that it's possible the California Supreme Court  
7 could say, well, there has been an intermediate  
8 appellate court that has decided this. We take on  
9 guidance that and believe these remedies would be  
10 covered. But there is nothing here that could assure  
11 this Court that that's the way it will work out.

12 With regards to why Bivens are superior,  
13 Bivens are superior when there is no State cause of  
14 action. So there will be some cases, as we concede,  
15 where a State cause of action is available. The reason  
16 Mr. Pollard brings a Federal cause of action in this  
17 case is because it's not clear that State remedies are  
18 certainly available.

19 And I think that certainty is an important  
20 thing for this Court to remember. The issue before  
21 Bivens itself was whether or not this Court should adopt  
22 a system of state remedies. And the --

23 JUSTICE BREYER: But the specific case with  
24 state remedies is not available is --

25 MR. FRANKLIN: Your Honor I'm not aware.

1                   MR. PREIS: Your Honor I'm not aware of any  
2 particular case where a state --

3                   JUSTICE BREYER: No, no, no. Your  
4 allegation, which you believe states a valid claim under  
5 Bivens action but not under state law is --

6                   MR. PREIS: The claims that we say do not  
7 have --

8                   JUSTICE BREYER: I don't understand  
9 specifically what they are. I mean it sounds to me that  
10 if a person, A, deliberately starves somebody to death,  
11 for example, or deliberately gives him something which  
12 will make him sick when he eats it, that that would at  
13 least be negligence and would arise under ordinary state  
14 tort law. So I'm curious to know what your claim is  
15 that does not arise under ordinary state tort law?

16                  MR. PREIS: Your Honor, I think that the  
17 starkest example, if it was the case that somebody  
18 actually starved someone --

19                  JUSTICE BREYER: No, don't answer my --  
20 forget my hypothetical. Tell me your specific claim  
21 that does not arise under state tort law, that's all I  
22 want to know, which is the same question I heard - I  
23 just didn't hear the answer to.

24                  MR. PREIS: Oh, excuse me, Your Honor.

25                  JUSTICE BREYER: I heard the answer in

1     general.

2                   MR. PREIS:   Okay.

3                   JUSTICE BREYER:  I want to know specifically  
4     what you say they did to your client that doesn't make  
5     out a State tort claim.

6                   MR. PREIS:  He brings four claims that he  
7     think alleges an Eighth Amendment violation.  One is the  
8     medical malpractice which we concede is likely  
9     available; the other three, we do not find sufficient  
10    evidence in California law that there certainly be a  
11    remedy.

12                   JUSTICE BREYER:  I heard you say --

13                   MR. PREIS:  And those three are --

14                   JUSTICE BREYER:  -- that.  I just want to  
15    know what it is physically you say the defendant did to  
16    your client, so that I can evaluate your statement that  
17    California gives no tort remedy for that.

18                   MR. PREIS:  Your Honor --

19                   JUSTICE BREYER:  Sorry, I don't mind to  
20    sound irritated but I just have trouble getting my  
21    question across.

22                   MR. PREIS:  Understood, Your Honor.  Mr.  
23    Pollard was deprived of adequate food and hygiene.  A  
24    second claim, he was --

25                   JUSTICE BREYER:  All right.  They failed to

1     give him adequate food for what? So he could live, or  
2     for what?

3                 MR. PREIS: Well, yes, adequate nutrition.  
4     I'm not saying to the point of death, but --

5                 JUSTICE BREYER: They gave him -- and if a  
6     person in California who has charge of -- of a ward or  
7     someone fails adequately to nourish that ward, you are  
8     saying California tort law gives no remedy?

9                 MR. PREIS: I'm saying there is no evidence  
10    that it does, Your Honor. I think it --

11                JUSTICE BREYER: -- cause like negligence,  
12    you give a remedy. It's not negligent; it's deliberate?  
13    Or what?

14                MR. PREIS: Your Honor, I think -- I would  
15    put -- I think the best way to approach that question is  
16    to look at the shoes of an attorney. When if someone  
17    comes in and says I was deprived of these benefits that  
18    I was entitled to and I was suffered a harm, the  
19    question would be for the lawyers, well, I'll go read  
20    the case --

21                JUSTICE SOTOMAYOR: You can't --

22                JUSTICE SCALIA: The lawyer would say I  
23    can't find a starving case in California. So you must  
24    not have a cause of action. Is that what the lawyer  
25    would say?

1                   MR. PREIS: No, I think the lawyer would  
2 say, I can't be certain. I haven't found a case --

3                   JUSTICE BREYER: -- of -- because the Eighth  
4 Amendment says cruel and unusual punishment. So you  
5 have to have a cruel treatment and where a person  
6 deliberately or negligently subjects someone else to  
7 cruel treatment, my -- my law school recollection of  
8 many years ago is that there ordinarily is a tort  
9 action.

10                   So, so -- that's what I would like you --  
11 I'm suspicious of your statement that there isn't.

12                   MR. PREIS: Yes.

13                   JUSTICE BREYER: Therefore, I ask for some  
14 elaboration of that.

15                   JUSTICE SCALIA: What do you have besides  
16 starving? What -- what else?

17                   MR. PREIS: The other claims were after he  
18 suffered his injuries he was put back on his work detail  
19 before his injuries were healed. He was also  
20 immediately after being injured forced to sort of endure  
21 excessive security measures, forced to wear particular  
22 handcuffs that pushed his arms in an -- in a way that  
23 would cause extraordinary pain and was unnecessary.

24                   JUSTICE KAGAN: Can I ask you the same  
25 question that I asked Mr. Franklin? Because it just



1 doesn't make any sense to me. The gravamen of this  
2 claim is a medical malpractice claim. Why aren't your  
3 State law remedies better? You have vicarious liability  
4 and all you have to prove is negligence. Why wasn't  
5 this brought as a State law claim?

6 MR. PREIS: Your Honor, I think there is two  
7 parts to that, two answers I would give. First, Mr.  
8 Pollard was put in a Federal prison by the Federal  
9 Government. He often has access -- actually only has  
10 access to Federal law books. When he sees himself  
11 injured he thinks this is presumably a Federal case. So  
12 I think there is a certain ethic or at least practice as  
13 how that works.

14 Now, why wouldn't medical malpractice work  
15 here.

16 JUSTICE KAGAN: Well that was just false  
17 consciousness that we can correct, right?

18 MR. PREIS: Excuse me, Your Honor, I missed  
19 the beginning.

20 JUSTICE KAGAN: I mean, if the -- if the  
21 true appropriate remedy, and the better remedy from your  
22 client's point of view, is a State law action, we should  
23 just say bring a State law.

24 MR. PREIS: Well we think that prisoners  
25 should have access to the State law action, and when

1     there is cause of action available, it might indeed be a  
2     better remedy. But I think in terms of whether or not  
3     medical malpractice works here, it will work in terms of  
4     detering the medical professionals, but we have  
5     multiple defendants in this case, not all of them -- of  
6     which would be culpable under -- or liable under a  
7     medical malpractice regime. How do we handle the other  
8     prisoners -- excuse me, the other defendants?

9             So I think you're focused in terms of the  
10    remedies available, and I would concede, of course,  
11    that's important to the -- to the prisoner; but course,  
12    the Court is concerned with deterrence in these cases.

13            So I want to return to Justice Breyer's  
14    question if I might. The gravamen of this case is that  
15    in ordinary cases, most of the time, and the Court is  
16    required in this case to figure how big is that "most of  
17    the time"? Is it 99 percent of time, is it 80 percent  
18    of the time? And that's what we simply don't have  
19    evidence on in this case. I want to point --

20            JUSTICE BREYER: When I went to law school,  
21    which was many years ago, instead of talking about,  
22    like, starvation cases or medical malpractice, they  
23    talked about a general thing called negligence.

24            MR. PREIS: Yes.

25            JUSTICE BREYER: And it seemed to apply to

1 doctors, and then it was medical malpractice, and it  
2 applied to others, and -- and is there something here  
3 that wouldn't fall in that general kind of rubric, or  
4 the general terms of California tort law?

5 MR. PREIS: Your Honor, I guess your --

6 JUSTICE BREYER: And I know, I don't want  
7 you just to repeat yourself. So I guess I have the best  
8 answer I have.

9 MR. PREIS: No -- Your Honor, I will say two  
10 things that -- first, I think what you are asking me to  
11 do and in a sense what the Court will be required to do  
12 in this case is predict what State supreme courts will  
13 do on a regular basis. And I would suggest -- suggest  
14 that's sort of an extraordinary measure to take in case  
15 where you have Federal prisoners, Federal constitutional  
16 rights and Federal actors.

17 JUSTICE SOTOMAYOR: -- limit our inquiry to  
18 California?

19 MR. PREIS: Excuse me?

20 JUSTICE SOTOMAYOR: Limit it to California.  
21 What -- what --

22 MR. PREIS: I don't --

23 JUSTICE SOTOMAYOR: They're saying don't  
24 look at what other courts will do, just look at the  
25 State you are in, the place you are going to make your

1 claim and figure out whether your claims are covered or  
2 not covered essentially in those -- in that State.

3 MR. PREIS: They are suggesting this Court  
4 look only at California.

5 JUSTICE SOTOMAYOR: Right.

6 MR. PREIS: We don't think that is  
7 appropriate. This Court's view has always been that a  
8 Bivens action exists or does not exist with regards to a  
9 entire category of defendants, or context.

10 JUSTICE SCALIA: So there -- if there is one  
11 State that would not have an adequate remedy for any --  
12 any single bad thing that could happen in prison, there  
13 is a Bivens action for everybody for everything? Is  
14 that what you are saying?

15 MR. PREIS: Yes, Your Honor, we are.

16 JUSTICE SCALIA: Wow.

17 MR. PREIS: I think if the Court were to  
18 write an opinion in that case --

19 JUSTICE SCALIA: I certainly wouldn't want  
20 to hold that.

21 (A little laughter.)

22 MR. PREIS: I'm not surprised that you  
23 wouldn't want to hold that, Your Honor.

24 (Laughter.)

25 JUSTICE BREYER: I would find that rather

1 surprising, too, actually.

2 (Laughter.)

3 MR. PREIS: Well --

4 JUSTICE BREYER: Because I -- I think what  
5 they're asking to do is fine. On their theory you have  
6 no problem, because you go back and show to the Court  
7 that there is no remedy in California for shackling a  
8 person -- I guess deliberately, with knowledge that that  
9 would cause severe pain, and if you can show that, then  
10 you are going to have your Bivens action in respect to  
11 that.

12 MR. PREIS: Well --

13 JUSTICE BREYER: That -- that -- what they  
14 are saying is that you are not going to be able to show  
15 that, so it doesn't worry them.

16 MR. PREIS: Your Honor, I think that the --  
17 the view that there's an ordinary duty of care, a duty  
18 to be reasonable, is quite a bit more complex than the  
19 Petitioners would make it out to be. Let me offer an  
20 example. In this case in 2007, the district court  
21 dismissed Mr. Pollard's complaint. The district court  
22 said you have State remedies.

23 Well, what was the proof for that? What was  
24 the State law remedy that existed? The only thing the  
25 district court cited in a footnote was section 1714 of

1 California's civil code.

2 JUSTICE SCALIA: Who says that the burden is  
3 on the other side? Why isn't the burden on you, if you  
4 want to bring a Bivens action, on you, to show that  
5 there is not an adequate State remedy?

6 MR. PREIS: Your Honor --

7 JUSTICE SCALIA: You are the plaintiff here,  
8 you are trying to bring the Federal cause of action.  
9 Our law is clear; if there is an adequate remedy we  
10 don't invent one. Why isn't it your burden to show that  
11 there is not an adequate State remedy?

12 MR. PREIS: Your Honor, two answers to that.  
13 First of all, this Court's most recent case where it  
14 dealt with whether or not a burden should exist was  
15 Wilkie, and there, the majority of the Court said when  
16 we look at alternative remedies we try to figure out,  
17 quote, "whether they amount to a" -- "amount to a  
18 convincing reason for the judicial branch to refrain  
19 from providing a new and free-standing remedy."

20 Inasmuch as there has been burden discussion  
21 in this Court's case law, it would seem to fall -- fall  
22 on the other side. Now, I think there is an important  
23 point here when we think of burden. This case is so  
24 close to Carlson that really the burden should be on  
25 them to take it out of Carlson. I want to address

1 Carlson for a second if I may.

2 CHIEF JUSTICE ROBERTS: Well, before you do,  
3 on page 5 of your brief you say, in the private prison  
4 setting, quote, "a Bivens claim against the offending  
5 individual offending officer," end quote, is an  
6 appropriate remedy. And the quote is from Malesko.

7 MR. PREIS: Yes.

8 CHIEF JUSTICE ROBERTS: What we said in  
9 Malesko, where you quote, is that if a Federal prisoner  
10 in a BOP facility alleges a constitutional deprivation,  
11 he may bring a Bivens claim against the offending  
12 individual officer. Now your friend describes that as a  
13 distortion of what we said in Malesko, and I just wanted  
14 to give you a chance to reply to what I think is a  
15 fairly serious assertion.

16 MR. PREIS: Yes, Your Honor, and I would  
17 seriously disagree with the suggestion it's a  
18 distortion.

19 CHIEF JUSTICE ROBERTS: Well, just to be  
20 clear. You quote that language, you say "in the private  
21 prison setting," and the language specifically says in a  
22 BOP facility.

23 MR. PREIS: Your Honor, what the Court was  
24 speaking of in that section of its opinion was that the  
25 remedies between a BOP facility and individuals in a

1 private facility should be similar, that it made no  
2 sense to give extra remedies to people in a private  
3 facility. And so the Court, Justice -- Chief Justice  
4 Rehnquist at the time was making a comparison saying  
5 there should be a general symmetry. And all we were  
6 pointing out in that quote is that inasmuch as symmetry  
7 matters, well, the Court there in Malesko had said, well  
8 we would likely expect there to be an individual remedy.

9 CHIEF JUSTICE ROBERTS: You would expect the  
10 same rule. That's your argument --

11 MR. PREIS: Yes.

12 CHIEF JUSTICE ROBERTS: -- to apply in the  
13 private prison setting. What you say is that there, we  
14 explained, that in the private prison setting, a Bivens  
15 claim against the offending individual officer was the  
16 appropriate remedy.

17 MR. PREIS: Your Honor, I guess I certainly  
18 took part of the quote and didn't use all of the quote,  
19 but I did not in any means say --

20 JUSTICE SCALIA: That's known as  
21 misquoting --

22 MR. PREIS: Well, Your Honor, I guess I  
23 would respectfully differ.

24 JUSTICE GINSBURG: Would you be taking the  
25 position that even if there is an alternative State



1 remedy, tort remedy, even so, there ought to be a power  
2 of Bivens action? Or would you say no Bivens action if  
3 all of the States have adequate tort remedies?

4 MR. PREIS: I think, Your Honor, if this  
5 Court would -- could tell with confidence that States in  
6 all States provided sufficient remedies for the entire  
7 variety of Eighth Amendment violations, this Court would  
8 be certainly wise in allowing State remedies to work.  
9 But I think we are far from that situation.

10 I want to turn, if I may --

11 JUSTICE KAGAN: Could you give me your best  
12 example of a State tort rule that would prevent a  
13 prisoner from bringing an Eighth Amendment claim?

14 MR. PREIS: Excuse me, Your Honor. Could  
15 you repeat that question?

16 JUSTICE KAGAN: Your best example of a tort  
17 rule from any State that would preclude a -- a valid  
18 Eighth Amendment claim.

19 MR. PREIS: In other words, the prisoner  
20 would have an Eighth Amendment claim but not a tort --

21 JUSTICE KAGAN: You have 50 States' worth of  
22 tort law to -- as your playground, and I want to know  
23 what tort rule would keep a prisoner with a valid Eighth  
24 Amendment claim -- would prevent him from recovering?

25 MR. PREIS: Your Honor, I would note

1 Maryland, for example. In Maryland, attacks by a  
2 prisoner on another prisoner are evaluated in terms of  
3 the liability of the warden; a lot evaluate it on a  
4 maliciousness standard. Now, the standard this Court  
5 uses in its acts by one prisoner against another is a  
6 deliberate indifference standard. The deliberate  
7 indifference standard is different.

8 We are not arguing in this case --

9 JUSTICE SCALIA: I don't understand what you  
10 are talking about. Is -- is this a suit against the  
11 prisoner who was attacked?

12 MR. PREIS: Excuse me, Your Honor?

13 JUSTICE SCALIA: He is not liable unless he  
14 is malicious, or what?

15 MR. PREIS: No, it's a suit against the  
16 warden for a failure to protect someone against attack  
17 by another prisoner.

18 JUSTICE SCALIA: I see. And -- and the  
19 warden is liable in Maryland, you say, only if he is  
20 malicious?

21 MR. PREIS: The test in Maryland is  
22 maliciousness, yes.

23 CHIEF JUSTICE ROBERTS: What about medical  
24 malpractice caps? Is that an issue? In other words,  
25 State law -- I don't know how many there are; I know

1     it's been proposed. I think it's true in some cases --  
2     will cap your recovery for medical malpractice at a  
3     particular level.

4                 MR. PREIS: Your Honor, I don't think it's a  
5     significant difference in this case. For instance,  
6     California --

7                 CHIEF JUSTICE ROBERTS: I guess that was a  
8     helpful question, in the sense that --

9                 MR. PREIS: Oh, I understand.

10                CHIEF JUSTICE ROBERTS: The Bivens action,  
11     presumably the cap would not apply. But it applies  
12     under State law.

13                MR. PREIS: I think there will be some cases  
14     in which the remedies will be curtailed under State law.  
15     And one could expect that the deterrent value of a State  
16     law remedy would not be available.

17                I have a couple of minutes remaining and I  
18     want to turn to Carlson. I think the suggestion in  
19     this -- the discussion that we have had so far is that  
20     we are asking the Court to reach out and create an  
21     extraordinary cause of action. I simply don't think  
22     that's true. This case is very similar, if not the same  
23     as, Carlson.

24                In Carlson, the Court said that a Federal  
25     prisoner has a cause of action against Federal actors

1 for a Federal constitutional right. That's what this  
2 case is. And the only distinction the Petitioners can  
3 point to is the fact that they are privately employed  
4 Federal actors as opposed to publicly employed Federal  
5 actors.

6           The question becomes, is "privately  
7 employed" Federal actor a meaningful distinction from  
8 "publicly employed"? We would -- if that distinction is  
9 meaningful, we would have expected to find some  
10 discussion of it in Malesko, but the Court there paid  
11 absolutely no attention to the private status. The  
12 Court in Malesko said that Malesko, that case, was in  
13 every meaningful sense the same as FDIC v. Meyer.  
14 FDIC v. Meyer was a suit against a public agency.

15           If the case is in every meaningful sense the  
16 same as Meyer, then it must have been what mattered to  
17 the Court in Malesko was that it was a suit against an  
18 entity, not public versus private. So we think there is  
19 no evidence in this case that -- excuse me -- no --  
20 nothing in the law that suggests that this Court cares  
21 and ever have cared the distinction between public and  
22 private remedies.

23           JUSTICE GINSBURG: But in Carlson, it was  
24 Bivens or no damage remedy. Here, that's not the case.

25           MR. PREIS: Excuse me, Your Honor, I missed

1 the first part of the question.

2 JUSTICE GINSBURG: In Carlson, the Court was  
3 operating on the theory that with respect to the Federal  
4 employees, it was a Bivens remedy for damages or no  
5 remedy at all.

6 MR. PREIS: No individual remedy.

7 JUSTICE GINSBURG: Right.

8 MR. PREIS: Yes, Your Honor.

9 JUSTICE GINSBURG: And here, it is different  
10 from Carlson because there is an -- a remedy against an  
11 individual. So we have the parallel remedies here which  
12 didn't exist in Carlson, and that makes the two cases  
13 different.

14 MR. PREIS: Your Honor, I think it's fair to  
15 say that in Carlson, the Court expressed a preference  
16 for an individual remedy over an entity remedy. But I  
17 don't think it's fair to say that the Court addressed in  
18 Carlson how it would compare to individual remedies.

19 That issue actually came up in Bivens.  
20 There was an individual remedy proposed that would be  
21 available under State law, and the alternative was a  
22 remedy under the Constitution itself. So when the Court  
23 was faced with two alternative individual actions, the  
24 Court said that we prefer the constitutional cause of  
25 action. And the reason in Bivens was we can't be

1 certain really how State law works.

2 CHIEF JUSTICE ROBERTS: Do you disagree  
3 that the -- I know you have your argument on  
4 compensation --

5 MR. PREIS: Yes.

6 CHIEF JUSTICE ROBERTS: But with respect to  
7 deterrence, is there any significant difference between  
8 the two causes of action? In other words, if you think  
9 the most significant aspect of Bivens is to deter  
10 constitutional violations, doesn't that work equally as  
11 well or perhaps more effectively under the State law  
12 than under Bivens?

13 MR. PREIS: Your Honor, I think in the end  
14 the question asks me to make a 50-State assessment of  
15 how State law works, and in that sense, one can only  
16 speak in generalizations --

17 CHIEF JUSTICE ROBERTS: So your answer --  
18 your answer is the same as under compensation, that the  
19 State law might be different or not?

20 MR. PREIS: We think, inasmuch as a cause of  
21 action is available, with the exception, as the Court  
22 noted, of damages caps, there -- we would expect to have  
23 a similar level of deterrence, provided the damages are  
24 available.

25 CHIEF JUSTICE ROBERTS: Who -- who actually

1 ends up paying in these Bivens actions? I mean, what we  
2 don't know -- is it the Federal government or an  
3 individual or --

4 MR. PREIS: We would expect -- first of all,  
5 obviously, the liability is imposed on the individual.  
6 We would expect as a general matter that there would be  
7 indemnification by the corporation. The question then  
8 is, of course, whether that gets passed on to the  
9 Federal government. And I don't think it's fair -- if  
10 the Court allows a Bivens action here, I think there's  
11 the suggestion that all of a sudden, there'll be a whole  
12 new realm of liability and costs. And that is simply  
13 not the case --

14 CHIEF JUSTICE ROBERTS: I'm just looking in  
15 terms of the practical deterrence. The problem I've had  
16 with it in general, I don't know how much practical  
17 deterrence there is, is if you sue the individual and  
18 the -- the individual doesn't actually pay, the  
19 government does. It seems to me perhaps more likely in  
20 the private context that the individual may get stuck  
21 with some amount of a liability if the employer just  
22 says, look, you were off doing something you weren't  
23 supposed to do; we are not going to pay for it.

24 MR. PREIS: Your Honor, I am not versed in  
25 the indemnification rules of private prisons, but I

1 would expect that there will be some instances where  
2 there is indemnification. I think the general rule in  
3 terms of --

4 JUSTICE SCALIA: Do you think that the  
5 warden of a Maryland prison is aware that if -- if he  
6 allows one prisoner to beat up another prisoner, he is  
7 only liable for maliciousness and not for deliberate  
8 indifference -- if indeed there is a difference between  
9 the two? Do -- do you think that -- that he is  
10 threading the needle that finely as far as -- as far as  
11 deterrence is concerned?

12 MR. PREIS: Your Honor, I think it's always  
13 been this Court's presumption that actors, legal actors,  
14 respond to the standards of law that are imposed. I  
15 can't say --

16 JUSTICE SCALIA: Not -- not at that level  
17 of -- of refinement. I mean, it seems to me that any  
18 warden knows he's subject to State tort law, and that  
19 State tort law renders him liable for negligence, and  
20 indeed for physical assaults. Some of your causes of  
21 action are intentional torts, not even negligence. I  
22 find it hard to believe that as far as deterrence is  
23 concerned, there is a dime's worth of difference between  
24 State law and -- and the Bivens action you are asking  
25 for.



1                   MR. PREIS: Your Honor, if it's the case  
2     that there's not a dime's worth of difference, that  
3     would only be at this point. And one can expect State  
4     law to change over time. I think one of the questions  
5     propounded to Mr. Franklin or Mr. Shah was, what if the  
6     state imposed a -- or created absolute immunity? I  
7     think -- I take Your Honor's point to be that there  
8     could be a similarity at one point. And we agree that  
9     that could exist for a particular circumstance. But we  
10    don't think this Court should take the enforcement of  
11    Federal rights in Federal prisons with regard to Federal  
12    actors and set up a scheme where that is handled through  
13    state law. There is simply not a justification there.

14                  Your Honor, I would like to address the  
15    Westfall Act. They argue strenuously that Congress has  
16    already spoken in this case, and that's simply not the  
17    case. In the FT-- put it this way. The FTCA and the  
18    Westfall Act deal only with Federal employees, the  
19    liability of Federal government for actions of Federal  
20    employees. Their argument is essentially that Congress  
21    attempted to deal with whether or not private  
22    contractors should be liable in these situations by  
23    amending a statute that has nothing to do with private  
24    contractors. And that simply doesn't work. It's not --  
25    there is no suggestion here that Congress attempted to

1 address this situation.

2 JUSTICE GINSBURG: Well, what was the  
3 purpose of making the reference to private contractors  
4 in the Westfall Act?

5 MR. PREIS: Your Honor, the Court -- excuse  
6 me, Congress did not make a reference to private  
7 contractors in the Westfall Act. They simply, Congress  
8 simply referred to employees of the United States. And  
9 the reason the Court -- excuse me, Congress referred to  
10 employees of the United States was because the FTCA only  
11 applies, and has always only applied to contractors --  
12 excuse me, of employees of the United States. There  
13 would have been no reason to reach out because it would  
14 be totally beyond the specter of the FTCA itself.

15 I think, Your Honor, there is something else  
16 to note with regard to Congress. At most, what we are  
17 dealing with here is congressional silence. They  
18 suggest that Congress is fit to take care of this.  
19 Nobody doubts that Congress is fit to step in and take  
20 care of this at some point in time. But Cong -- this  
21 Court's practice with regards to Bivens has been when  
22 Congress steps in, to stand back. But here we have  
23 congressional silence. As this-- as the Court said in  
24 2007, it's most recent Bivens case was, when you are  
25 dealing -- well, excuse me -- the Wilkie case did not

1     involve any specific congressional action. The Court  
2     viewed it essentially as congressional silence. The  
3     majority of this Court at that time said our evaluation  
4     in that instance is to figure out -- excuse me --  
5     whether the Federal courts must make the kind of  
6     remedial determination that is appropriate for a common  
7     law tribunal. The Court at that point saw itself as  
8     that point as a common law tribunal within the specific  
9     circumstance of whether or not a Bivens remedy should be  
10    available. That's not to say the Court should adopt  
11    some sort of roving common law power. It's simply to  
12    say where there's congressional silence and the case  
13    looks almost identical to Carlson, if not identical,  
14    that there is sufficient reason for this Court to find a  
15    Bivens cause of action here.

16                 If there are no further questions, I urge  
17    this Court to affirm the holding of the Ninth Circuit.

18                 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19                 Mr. Franklin, you have four minutes  
20    remaining.

21                 REBUTTAL ARGUMENT OF JONATHAN S. FRANKLIN

22                 ON BEHALF OF THE PETITIONERS

23                 MR. FRANKLIN: Thank you, Mr. Chief Justice.

24                 I just wanted to correct one common  
25    misimpression. There is no allegation here that anyone

1 was deliberately starved. With the allegation regarding  
2 the food, his allegation in his complaint is that he,  
3 because presumably his arms were in casts, he couldn't  
4 hold his tray in the cafeteria and therefore he says I  
5 had to buy my own food from the commissary because I  
6 didn't want to be humiliated by going to the cafeteria.

7 We think that if that claim somehow stated a  
8 claim under the Eighth Amendment for deliberate  
9 indifference, that he would state a claim under  
10 negligence as well, and all of these claims essentially  
11 are that the prison failed to accommodate his injuries.  
12 Malesko was the same. In Malesko the argument was I  
13 didn't get to use an elevator because I had a  
14 preexisting condition, and that's what caused my harm.

15 If there is something that negligently  
16 causes harm, unreasonably causes harm, there is a remedy  
17 in California. I would also note that if it does not  
18 cause harm, there is no Bivens remedy, because Congress  
19 in the PLRA has said you cannot bring any claim if you  
20 are a prisoner in Federal court unless it involves  
21 physical harm.

22 JUSTICE SCALIA: Do you want us to hold that  
23 there is no Bivens action in California? Is that -- is  
24 that what our opinion is going to say?

25 MR. FRANKLIN: I think the opinion could be

1 as it was in Malesko, there is no Bivens action because  
2 there are alternative remedies. We think that holding  
3 in Malesko would apply everywhere. Everybody has --  
4 every State has a negligence cause of action. And I  
5 think one thing that crystallized the argument for me is  
6 the colloquy between Justice Scalia and -- and my  
7 friend, where I think there was an admission that what  
8 they are actually seeking is a blanket cause of action  
9 to account for any possible instance in which there is  
10 an inadequate remedy.

11 I think it goes even further. I think they  
12 are asking for a blanket cause of action if somebody can  
13 hypothesize an interest -- and issue; and even further  
14 than that, even if we can't hypothesize it, maybe  
15 somewhere along the line something could happen. We  
16 think that's a -- a flipping, a turning Bivens on its  
17 head. Bivens is a narrow remedy that is only allowed  
18 when it is necessary. If those circumstances arise they  
19 can be dealt with at that time.

20 JUSTICE GINSBURG: Do you know if any of  
21 these Bivens claims have been pled in the alternative,  
22 that is the Bivens remedy, but alternatively State law?

23 MR. FRANKLIN: Yes, that does happen, Your  
24 Honor. Yes. And it happens I think relatively  
25 frequently. But in these circumstances we would expect

1 if the Court rules our way that there would be in fact  
2 resort to what are not only adequate, but superior State  
3 law remedies, and that Bivens would then be reserved for  
4 another day if something happened that might implicate  
5 it.

6 If there are no further questions --

7 JUSTICE GINSBURG: Is there diversity in  
8 this case?

9 MR. FRANKLIN: There may be. I think -- I  
10 think he alleged that there was. We would agree with  
11 the other side that the domicile of a -- of a prisoner  
12 at least in the circuits is determined by where the  
13 prisoner had been before they were in prison, and I  
14 think this particular prisoner had been somewhere other  
15 than California. So probably. I can't -- I can't say  
16 about the -- the mounting -- controversy but probably.

17 JUSTICE GINSBURG: So you -- ou said there  
18 was a statute of limitations problem with starting new.

19 MR. FRANKLIN: Yes.

20 JUSTICE GINSBURG: What about if there is  
21 diversity --

22 MR. FRANKLIN: Well, the case was dismissed.

23 JUSTICE GINSBURG: -- that's allowing an  
24 amendment.

25 MR. FRANKLIN: The case was dismissed, Your

1 Honor, and it was appealed only on the ground of a  
2 Bivens claim. So if that is rejected, there is no more  
3 case. There is nothing to amend.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
5 The case is submitted.

6 (Whereupon, at 11:59 a.m., the case in the  
7 above-entitled matter was submitted.)

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